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News Summary

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Chicago, Chicago!

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Legislation to reverse the effect of the Supreme Court's Grove City College decision was approved by the House of Representatives last week. Story on Page 13.

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Reagan Prepared to Negotiate with Soviet Union for Expansion of Scholarly Exchange Programs

White House officials call President's speech in Washington 'conciliatory'

By MALCOLM G. SCULLY

WASHINGTON

President Reagan last week endorsed the expansion of educational and cultural exchanges with the Soviet Union and said the United States was prepared to "initiate negotiations on a new exchange agreement."

In what White House aides called a "conciliatory" speech, Mr. Reagan told scholars and foundation officials attending a meeting on Soviet-American exchanges here that "nothing is more worthy of our attention than finding ways to reach out and establish better communication with the people and the government of the Soviet Union." The President delivered his remarks at the White House to participants in the meeting, which was held at the Kennan Institute for Advanced Soviet Studies at the Smithsonian Institution's Woodrow Wilson Center.

The Administration indicated last summer that the United States was prepared to resume negotiations with the Russians over a new agreement on cultural, scientific, and scholarly exchanges. Those plans were scrapped in September after the Soviet Union's destruction of a South Korean airliner.

At issue is an "umbrella" agreement, first signed in 1958, under which many of the subsequent scholarly and scientific exchanges were organized. The agreement expired in 1979 and has never been renewed, primarily because of the chill in East-West relations brought on by the Soviet invasion of Afghanistan, the arrest in 1980 of Andrei D. Sakharov, and Russian support for martial law in Poland.

While the chill has brought an end to exchanges of performing-arts groups and cultural exhibits, some scholarly visits have continued, including Fulbright lec-

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COURTS 3, NCAA 0

Supreme Court Strikes Down NCAA Control of Football on Television; Colleges Free to Negotiate Own Contracts

High Court's action

By CHARLES S. FARRELL

WASHINGTON

The Supreme Court ruled last week that the National Collegiate Athletic Association's control of televised intercollegiate football violated antitrust law. It endorsed a lower court's finding that such control was that of "a classic cartel."

The Court said other controls that the N.C.A.A. imposes on collegiate athletics were appropriate to maintain the amateur status of such sports.

The Court's 7-to-2 ruling voided the last two years of the N.C.A.A.'s contracts with three television networks, contracts worth about $140-million. Network spokesmen said contingency plans were being explored.

In affirming the lower court's ruling, the Supreme Court held that the television plan that the N.C.A.A. negotiated in 1981 with three broadcasting companies violated federal antitrust laws. The Universities of Georgia and Oklahoma, which wanted to negotiate their own TV deals, brought a lawsuit challenging the association's role.

Said Justice John Paul Stevens, writing

Continued on Page 22, Column 1

Decisions in 2 States Go Against NCAA

► A Nevada judge ruled in favor of basketball coach Jerry Tarkanian.

► A Maryland appeals court refused to lift an injunction barring enforcement of eligibility rules.

Stories on Page 19

Contract negotiations

WASHINGTON

Individual colleges will be able to negotiate their own pacts to televise football games as a result of last week's Supreme Court ruling that the National College Athletic Association does not have exclusive rights to such negotiations.

More games will probably be telecast as a result of the decision. Big, well-known football programs will benefit the most, while smaller programs will probably be hurt.

College and television officials were uncertain last week exactly what form the new TV contracts will take. There were warnings that some arrangements that have been discussed—including one developed for the major football powers by the

Continued on Page 24, Column 1

Social and Political Dilemmas Hit Agriculture Research

At U. of California, tomato harvesters and genetic testing are the subjects of lawsuits

By LAWRENCE BIEMILLER

DAVIS, CAL.

Gary Anderson remembers being startled when, a couple of years ago, he was called upon to defend his application for a grant to investigate ways to increase the already prodigious milk output of American dairy cows.

What surprised him, he says, was not that the interviewers had questions about his application, but that—for the first time in his experience—their questions challenged the desirability of the research he had proposed, rather than merely scrutinizing procedural details. "They asked, 'Why?' " he says. "It knocked my socks off."

And so Mr. Anderson, a professor of animal science at the University of California, Davis, unexpectedly found himself embroiled in a discussion of the size of the nation's dairy-product surplus and the cost of the federal government's dairy-price-support program. His research project on milk production, it seemed, might well become a hostage of the dairy-product overabundance that researchers before him had helped to create, and that—in the animal-science department here, in dairy barns across the country, and in the U.S. Department of Agriculture's massive headquarters back in Washington—no one seemed able to control.

For Mr. Anderson, that interview confirmed what some faculty members on this and other agriculture-college campuses had already begun to say—that the relaxed isolation of agriculture-college researchers was coming to an end.

Long accustomed to conducting research that attracted the attention of only a friendly handful of county extension agents and commodity-association representatives, faculty members in agriculture colleges began in the late 1970's to find themselves more often in the public spotlight. Their research began to be watched more closely by

Continued on Page 10, Column 1

Text of Supreme Court's Majority Opinion Striking Down NCAA's Control

WASHINGTON

Following is the text of the Supreme Court's decision in National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, in which the Court struck down the N.C.A.A.'s control of televised college football.

The opinion was written by Justice John Paul Stevens, who was joined by Chief Justice Warren E. Burger and Justices William J. Brennan, Jr., Thurgood Marshall, Harry A. Blackmun, Louis F. Powell, Jr., and Sandra Day O'Connor.

Footnotes and some citations have been omitted.

The University of Oklahoma and the University of Georgia contend that the National Collegiate Athletic Association has unreasonably restrained trade in the televising of college football games. After an extended trial, the District Court found that the NCAA had violated §1 of the Sherman Act and granted injunctive relief. 546 F. Supp. 1276 (W.D Okla. 1982). The Court of Appeals agreed that the statute had been violated but modified the remedy in some respects. 707 F. 2d 1147 (CA10 1983). We granted certiorari, and now affirm.

I

The NCAA

Since its inception in 1905, the NCAA has played an important role in the regulation of amateur collegiate sports. It has adopted and promulgated playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of athletes, and rules governing the size of athletic squads and coaching staffs.

In some sports, such as baseball, swimming, basketball, wrestling, and track, it has sponsored and conducted national tournaments. It has not done so in the sport of football, however. With the exception of football, the NCAA has not undertaken any regulation of the televising of athletic events.

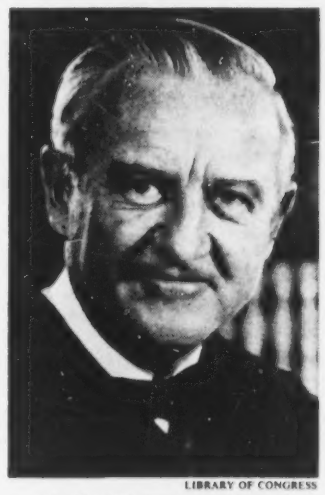
The NCAA has approximately 850 voting members. The regular members are classified into separate divisions to reflect differences in size and scope of their athletic programs. Division I includes 276 colleges with major athletic programs; in this group only 187 play intercollegiate football. Divisions II and III include approximately 500 colleges with less extensive athletic programs. Division I has been subdivided into Divisions I-A and I-AA for football.

Some years ago, five major conferences together with major football-playing independent institutions organized the College Football Association. The original purpose of the CFA was to promote the interests of major football-playing schools within the NCAA structure. The Universities of Oklahoma and Georgia, respondents in this Court, are members of the CFA.

History of the NCAA Television Plan

In 1938, the University of Pennsylvania televised one of its home games. From 1940 through the 1950 season all of Pennsylvania's home games were televised. That was the beginning of the relationship between television and college football.

On January 11, 1951, a three-person "Television Committee," appointed during the preceding year, delivered a report to the NCAA's annual convention in Dallas. Based on preliminary surveys, the committee had concluded that "television does



LIBRARY OF CONGRESS

Justice Stevens wrote opinion striking down N.C.A.A.'s control of college football telecasts.

have an adverse effect on college football attendance and unless brought under some control threatens to seriously harm the nation's overall athletic and physical system." The report emphasized that "the television problem is truly a national one and requires collective action by the colleges."

As a result, the NCAA decided to retain the National Opinion Research Center to study the impact of television on live attendance, and to declare a moratorium on the televising of football games. A television committee was appointed to implement the decision and to develop an NCAA television plan for 1951.

The committee's 1951 plan provided that only one game a week could be telecast in each area, with a total blackout on 3 of the 10 Saturdays during the season. A team could appear on television only twice during a season. The plan also provided that the NORC would conduct a systematic study of the effects of the program on attendance. The plan received the virtually unanimous support of the NCAA membership; only the University of Pennsylvania challenged it.

Pennsylvania announced that it would televise all its home games. The council of the NCAA thereafter declared Pennsylvania a member in bad standing and the four institutions scheduled to play at Pennsylvania in 1951 refused to do so. Pennsylvania then reconsidered its decision and abided by the NCAA plan.

During each of the succeeding five seasons, studies were made which tended to indicate that television had an adverse effect on attendance at college football games. During those years the NCAA continued to exercise complete control over the number of games that could be televised.

From 1952 through 1977 the NCAA television committee followed essentially the same procedure for developing its television plans. It would first circulate a questionnaire to the membership and then use the responses as a basis for formulating a plan for the ensuing season. The plan was then submitted to a vote by means of a mail referendum. Once approved, the plan formed the basis for NCAA's negotiations with the networks.

Throughout this period the plans retained the essential purposes of the original plan. Until 1977 the contracts were all for either 1- or 2-year terms. In 1977 the NCAA adopted "principles of negotiation" for the future and discontinued the practice of submitting each plan for membership approval. Then the NCAA also entered into its first 4-year contract granting exclusive rights to the American Broadcasting Companies for the 1978-1981 seasons. ABC had held the exclusive rights to network telecasts of NCAA football games since 1965.

The Current Plan

The plan adopted in 1981 for the 1982-1985 seasons is at issue in this case. This plan, like each of its predecessors, recites that it is intended to reduce, insofar as possible, the adverse effects of live television upon football game attendance. It provides that "all forms of television of the football games of NCAA member institutions during the Plan control periods shall be in accordance with this Plan." The plan recites that the television committee has awarded rights to negotiate and contract for the telecasting of college football games of members of the NCAA to two "carrying networks." In addition to the principal award of rights to the carrying networks, the plan also describes rights for a "supplementary series" that had been awarded for the 1982 and 1983 seasons, as well as a procedure for permitting specific "exception telecasts."

In separate agreements with each of the carrying networks, ABC and the Columbia Broadcasting System, the NCAA granted each the right to telecast the 14 live "exposures" described in the plan, in accordance with the "ground rules" set forth therein. Each of the networks agreed to pay a specified "minimum aggregate compensation to the participating NCAA member institutions" during the 4-year period in an amount that totaled $131,750,000.

In essence the agreement authorized each network to negotiate directly with member schools for the right to televise their games. The agreement itself does not describe the method of computing the compensation for each game, but the practice that has developed over the years and that the District Court found would be followed under the current agreement involved the setting of a recommended fee by a representative of the NCAA for different types of telecasts, with national telecasts being the most valuable, regional telecasts being less valuable, and Division II or Division III games commanding a still lower price. The aggregate of all these payments presumably equals the total minimum aggregate compensation set forth in the basic agreement. Except for differences in payment between national and regional telecasts, and with respect to Division II and Division III games, the amount that any team receives does not change with the size of the viewing audience, the number of markets in which the game is telecast, or the particular characteristic of the game or the participating teams. Instead, the "ground rules" provide that the carrying networks make alternate selections of those games they wish to televise, and thereby obtain the exclusive right to submit a bid at an essentially fixed price to the institutions involved.

The plan also contains "appearance requirements" and "appearance limitations" which pertain to each of the 2-year periods that the plan is in effect. The basic requirement imposed on each of the two networks is that it must schedule appearances for at least 82 different member institutions during each 2-year period. Under the appearance limitations no member institution is

High Court Strikes Down NCAA Control of Football on Television

Continued from Page 1

for the Court's majority. "There can be no doubt that the challenged practices of the N.C.A.A. constitute a 'restraint of trade' in the sense that they limit members' freedom to negotiate and enter into their own television contracts."

At the heart of the restraint of trade, he said, are the limitations the N.C.A.A. placed on the amount of money an institution could receive for an appearance on television, the numbers of times a team could appear, and the total number of games that could be telecast.

Under the 1981 contract, worth $263-million over four years, a football team could appear on television six times in two years and the institution could net a flat fee of $600,000 per appearance. "Because it restrains price and output," Justice Stevens said, "the N.C.A.A.'s television plan has a significant potential for anticompetitive effects."

Viewer Demand Not Reflected

Moreover, the Court decided, by fixing the price for television rights to all games, the association created a price structure that did not reflect viewer demand and was not related to prices that would prevail in a competitive market. The Court's ruling upheld decisions by the U.S. Court of Appeals for the Tenth Circuit and the U.S. District Court for the Western District of Oklahoma.

The N.C.A.A. had argued that one reason it needed to maintain control over televised games was to protect live attendance, but the Court decided that that argument "is not based on a desire to maintain the integrity of college football as a distinct and attractive product, but rather on a fear that the product will not prove sufficiently attractive to draw live attendance when faced with competition from televised games."

Competitive Balance Argued

The N.C.A.A. had also argued that its interest in maintaining a competitive balance among collegiate athletic teams justified its regulating television contracts. But the Supreme Court said that the television plan had not been tailored to serve such an interest.

"It does not regulate the amount of money any college may spend on its football program," the Court said, "nor the way in which the colleges may use the revenues that are generated by their football programs, whether derived from the sale of television rights, the sale of tickets, or the sale of concessions or program advertising. The plan simply imposes a restriction on one source of revenue that is more important to some colleges than to others."

The Court observed that no other N.C.A.A. sport used a similar plan, and that in college basketball, which comes closest to producing the same amount of revenue as football does, the competition was balanced without a restrictive TV plan. But the Court agreed with the association that "it is reasonable to assume that most of the regulatory controls of the N.C.A.A. are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics."

The N.C.A.A. therefore has a legitimate concern in promulgating such things as playing rules, standards of academic eligibility, and the size of teams and coaching staffs, the Court indicated.

White and Rehnquist Dissent

Justice Byron R. White, whose stay of a lower-court ruling last July allowed the normal broadcasting schedule to continue for the 1983 season, dissented from the Court's majority, along with Justice William H. Rehnquist.

"Although some of the N.C.A.A.'s activities, viewed in isolation, bear a resemblance to those undertaken by professional sports leagues and associations," Justice White said, "the Court errs in treating intercollegiate athletics under the N.C.A.A.'s control as a purely commercial venture in which colleges and universities participate solely, or even primarily, in the pursuit of profits."

The association exists to enhance the contribution of amateur athletic competition to the process of higher education, said Justice White, a former All-American running back who was known as "Whizzer" during his playing days at the University of Colorado.

"In pursuing this goal," Justice White said, "the organization and its members seek to provide a public good—a viable system of amateur athletics—that most likely could not be provided in a perfectly competitive market."

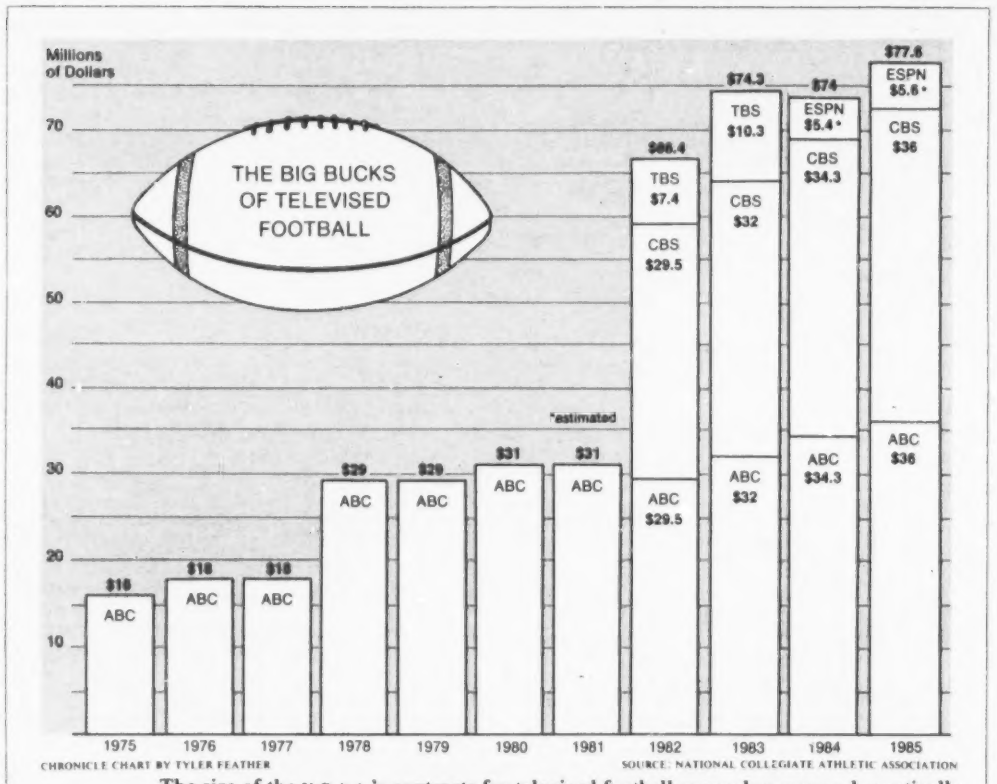
While the Court's decision left televised college football in limbo, the ruling is not expected to have extensive applications to the N.C.A.A.'s other activities, according to one antitrust lawyer who reviewed the opinions.

Janet L. McDavid, with the Washington-based firm of Hogan & Hartson, said the justices appeared to have rendered an extremely narrow verdict.

"It seems to me the Court went out of its way to suggest that most of what the N.C.A.A. does, in regard to regulations, essentially maintains the character of amateur athletics and would survive antitrust challenges," she said. "Cooperation with the N.C.A.A. is needed to market football because it enables college football to preserve its unique character."

What the N.C.A.A. must do, if it wishes to continue to have a hand in negotiating television contracts, is to address the fundamental points of restricting the number of games that can be televised and the amount that can be paid for broadcasting rights, Ms. McDavid said.

# of College Football Telecasts


Millions of Dollars
THE BIG BUCKS OF TELEVISED FOOTBALL
*estimated
1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985
$16 $16 $16 $29 $29 $31 $31 $66.4 $74.3 $74 $77.6
ABC ABC ABC ABC ABC ABC ABC ABC $29.5 TBS $7.4 CBS $29.5 TBS $10.3 CBS $32 ABC $32 ESPN $5.4* CBS $34.3 ABC $34.3 ESPN $5.6* CBS $36 ABC $36
CHRONICLE CHART BY TYLER FEATHER
SOURCE: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

The size of the N.C.A.A.'s contracts for televised football games has grown dramatically in recent years, largely due to the addition of coverage by CBS, Turner Broadcasting, and the Entertainment and Sports Programming Network (ESPN).

eligible to appear on television more than a total of six times and more than four times nationally, with the appearances to be divided equally between the two carrying networks. The number of exposures specified in the contracts also sets an absolute maximum on the number of games that can be broadcast.

Thus, although the current plan is more elaborate than any of its predecessors, it retains the essential features of each of them. It limits the total amount of televised intercollegiate football and the number of games that any one team may televise. No member is permitted to make any sale of television rights except in accordance with the basic plan.

Background of This Controversy

Beginning in 1979 CFA members began to advocate that colleges with major football programs should have a greater voice in the formulation of football television policy than they had in the NCAA. CFA therefore investigated the possibility of negotiating a television agreement of its own, developed an independent plan, and obtained a contract offer from the National Broadcasting Company. This contract, which it signed in August 1981, would have allowed a more liberal number of appearances for each institution, and would have increased the overall revenues realized by CFA members.

In response the NCAA publicly announced that it would take disciplinary action against any CFA member that complied with the CFA-NBC contract. The NCAA made it clear that sanctions would not be limited to the football programs of CFA members, but would apply to other sports as well. On September 8, 1981, respondents commenced this action in the United States District Court for the Western District of Oklahoma and obtained a preliminary injunction preventing the NCAA from initiating disciplinary proceedings or otherwise interfering with CFA's efforts to perform its agreement with NBC. Notwithstanding the entry of the injunction, most CFA members were unwilling to commit themselves to the new contractual arrangement with NBC in the face of the threatened sanctions and therefore the agreement was never consummated.

Decision of the District Court

After a full trial, the District Court held that the controls exercised by the NCAA over the televising of college football games violated the Sherman Act. The District Court defined the relevant market as "live college football television" because it found that alternative programming has a significantly different and lesser audience appeal. The District Court then concluded that the NCAA controls over college football are those of a "classic cartel" with an "almost absolute control over the supply of college football which is made available to the networks, to television advertisers, and ultimately to the viewing public. Like all other cartels, NCAA members have sought and achieved a price for their product which is, in most instances, artificially high. The NCAA cartel imposes production limits on its members, and maintains mechanisms for punishing cartel members who seek to stray from these production quotas. The cartel has established a uniform price for the products of each of the member producers, with no regard for the differing quality of these products or the consumer demand for these various products."

The District Court found that competition in the relevant market had been restrained in three ways: (1) NCAA fixed the price for particular telecasts; (2) its exclusive network contracts were tantamount to a group boycott of all other potential broadcasters and its threat of sanctions against its own members constituted a threatened boycott of potential competitors; and (3) its plan placed an artificial limit on the production of televised college football.

In the District Court the NCAA offered two principal justifications for its television policies: that they protected the gate attendance of its members and that they tended to preserve a competitive balance among the football programs of the various schools. The District Court rejected the first justification because the evidence did not support the claim that college football television adversely affected gate attendance. With respect to the "competitive balance" argument, the District Court found that the evidence failed to show that the NCAA regulations on matters such as recruitment and the standards for preserving amateurism were not sufficient to maintain an appropriate balance.

Decision of the Court of Appeals

The Court of Appeals held that the NCAA television plan constituted illegal *per se* price fixing. It rejected each of the three arguments advanced by NCAA to establish the procompetitive character of its plan.

First, the court rejected the argument that the television plan promoted live attendance, noting that since the plan involved a concomitant reduction in viewership the plan did not result in a net increase in output and hence was not procompetitive.

Second, the Court of Appeals rejected as illegitimate the NCAA's purpose of promoting athletically balanced competition. It held that such a consideration amounted to an argument that "competition will destroy the market"—a position inconsistent with the policy of the Sherman Act. Moreover, assuming *arguendo* that the justification was legitimate, the court agreed with the District Court's finding "that any contribution the plan made to athletic balance could be achieved by less restrictive means."

Third, the Court of Appeals refused to view the NCAA plan as competitively justified by the need to compete effectively with other types of television programming, since it entirely eliminated competition between producers of football and hence was illegal *per se*.

Finally, the Court of Appeals concluded that even if the television plan were not *per se* illegal, its anticompetitive limitation on price and output was not offset by any procompetitive justification sufficient to save the plan even when the totality of the circumstances was examined. The case was remanded to the District Court for an appropriate modification in its injunctive decree.

II

There can be no doubt that the challenged practices of the NCAA constitute a "restraint of trade" in the sense that they limit members' freedom to negotiate and enter into their own television contracts. In that sense, however, every contract is a restraint of trade, and as we have repeatedly recognized, the Sherman Act was intended to prohibit only unreasonable restraints of trade.

It is also undeniable that these practices share characteristics of restraints we have previously held unreasonable. The NCAA is an association of schools which compete against each other to attract television revenues, not to mention fans and athletes. As the District Court found, the policies of the NCAA with respect to television rights are ultimately controlled by the vote of member institutions. By participating in an association which prevents member institutions from competing against each other on the basis of price or kind of television rights that can be offered to broadcasters, the NCAA member institutions have created a horizontal restraint—an agreement among competitors on the way in which they will compete with one another.

A restraint of this type has often been held to be unreasonable as a matter of law. Because it places a ceiling on the number of games member institutions may televise the horizontal agreement places an artificial limit on the quantity of televised football that is available to broadcasters and consumers. By restraining the quantity of television rights available for sale, the challenged practices create a limitation on output; our cases have held that such limitations are unreasonable restraints of trade.

Moreover, the District Court found that the minimum aggregate price in fact operates to preclude any price negotiation between broadcasters and institutions, thereby constituting horizontal price fixing, perhaps the paradigm of an unreasonable restraint of trade.

Horizontal price-fixing and output limitation are ordinarily condemned as a matter of law under an "illegal *per se*" approach because the probability that these practices are anticompetitive is so high; a *per se* rule is applied when "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 19-20 (1979). In such circumstances a restraint is presumed unreasonable without inquiry into the particular market context in which it is found. Nevertheless, we have decided that it would be inappropriate to apply a *per se* rule to this case.

This decision is not based on a lack of judicial experience with this type of arrangement, on the fact that the NCAA is organized as a nonprofit entity, or on our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics. Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.

As Judge Bork has noted: "[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams." R. Bork, The Antitrust Paradox 278 (1978). What the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete.

Moreover, the NCAA seeks to market a particular brand of football—college football. The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.

Broadcast Music squarely holds that a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive. Similarly, as we indicated in *Continental T. V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 51-57 (1977), a restraint in a limited aspect of a market may actually enhance marketwide competition. Respondents concede that the great majority of the NCAA's regulations enhance competition among member institutions. Thus, despite the fact that this case involves restraints on the ability of member institutions to compete in terms of price and output, a fair evaluation of their competitive character requires consideration of the NCAA's justifications for the restraints.

Our analysis of this case under the Rule of Reason, of course, does not change the ultimate focus of our inquiry. Both *per se* rules and the Rule of Reason are employed "to form a judgment about the competitive significance of the restraint." *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978). A conclusion that a restraint of trade is unreasonable may be "based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under ei-

Continued on Following Page

Majority Opinion

Continued from Preceding Page
ther branch of the test, the inquiry is confined to a consideration of impact on competitive conditions."

Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct. But whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition. Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition.

III

Because it restrains price and output, the NCAA's television plan has a signficant potential for anticompetitive effects. The findings of the District Court indicate that this potential has been realized. The District Court found that if member institutions were free to sell television rights, many more games would be shown on television, and that the NCAA's output restriction has the effect of raising the price the networks pay for television rights.

Moreover, the court found that by fixing a price for television rights to all games, the NCAA creates a price structure that is unresponsive to viewer demand and unrelated to the prices that would prevail in a competitive market. And, of course, since as a practical matter all member institutions need NCAA approval, members have no real choice but to adhere to the NCAA's television controls.

The anticompetitive consequences of this arrangement are apparent. Individual competitors lose their freedom to compete. Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference.

This latter point is perhaps the most significant, since "Congress designed the Sherman Act as a 'consumer welfare prescription.' " (*Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979). A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law. Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit. See *Standard Oil Co.* v. *United States*, 221 U.S. 1, 52-60 (1911). At the same time, the television plan eliminates competitors from the market, since only those broadcasters able to bid on television rights covering the entire NCAA can compete. Thus, as the District Court found, many telecasts that would occur in a competitive market are foreclosed by the NCAA's plan.

Petitioner argues, however, that its television plan can have no significant anticompetitive effect since the record indicates that it has no market power—no ability to alter the interaction of supply and demand in the market. We must reject this argument for two reasons, one legal, one factual.

As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." Petitioner does not quarrel with the District Court's finding that price and output are not responsive to demand. Thus the plan is inconsistent with the Sherman Act's command that price and supply be responsive to consumer preference. We have never required proof of market power in such a case. This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.

As a factual matter, it is evident that petitioner does possess market power. The District Court employed the correct test for determining whether college football broadcasts constitute a separate market—whether there are other products that are reasonably substitutable for televised NCAA football games. Petitioner's argument that it cannot obtain supracompetitive prices from broadcasters since advertisers, and hence broadcasters, can switch from college football to other types of programming simply ignores the findings of the District Court. It found that intercollegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience. These findings amply support its conclusion that the NCAA possesses market power.

Indeed, the District Court's subsidiary finding that advertisers will pay a premium price per viewer to reach audiences watching college football because of their demographic characteristics is vivid evidence of the uniqueness of this product. Moreover, the District Court's market analysis is firmly supported by our decision in *International Boxing Club* v. *United States*, 358 U.S. 242 (1958), that championship boxing events are uniquely attractive to fans and hence constitute a market separate from that for nonchampionship events. Thus, respondents have demonstrated that there is a separate market for telecasts of college football which "rest[s] on generic qualities differentiating" viewers. *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 613 (1953).

It inexorably follows that if college football broadcasts be defined as a separate market—and we are convinced they are—then the NCAA's complete control over those broadcasts provides a solid basis for the District Court's conclusion that the NCAA possesses market power with respect to those broadcasts. "When a product is controlled by one interest, without substitutes available in the market, there is monopoly power." *United States* v. *E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 394 (1956).

Thus, the NCAA television plan on its face constitutes a restraint upon the operation of a free market, and the findings of the District Court establish that it has operated to raise price and reduce output. Under the Rule of Reason, these hallmarks of anticompetitive behavior place upon petitioner a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market. We turn now to the NCAA's proffered justifications.

IV

Relying on *Broadcast Music*, petitioner argues that its television plan constitutes a cooperative "joint venture" which assists in the marketing of broadcast rights and hence is procompetitive. While joint ventures have no immunity from the antitrust laws, as *Broadcast Music* indicates, a joint selling arrangement may "mak[e] possible a new product by reaping otherwise unattainable efficiencies."

The essential contribution made by the NCAA's arrangement is to define the number of games that may be televised, to establish the price for each exposure, and to define the basic terms of each contract between the network and a home team. The NCAA does not, however, act as a selling agent for any school or for any conference of schools. The selection of individual games, and the negotiation of particular agreements, is a matter left to the networks and the individual schools. Thus, the effect of the network plan is not to eliminate individual sales of broadcasts, since these still occur, albeit subject to fixed prices and output limitations. Unlike *Broadcast Music*'s blanket license covering broadcast rights to a large number of individual compositions, here the same rights are still sold on an individual basis, only in a noncompetitive market.

The District Court did not find that the NCAA's television plan produced any procompetitive efficiencies which enhanced the competitiveness of college football television rights; to the contrary it concluded that NCAA football could be marketed just as effectively without the television plan. There is therefore no predicate in the findings for petitioner's efficiency justification. Indeed, petitioner's argument is refuted by the District Court's finding concerning price and output. If the NCAA's television plan produced procompetitive efficiencies, the plan would increase output and reduce the price of televised games. The District Court's contrary findings accordingly undermine petitioner's position. In light of these findings, it cannot be said that "the agreement on price is necessary to market the product at all." In *Broadcast Music*, the availability of a package product that no individual could offer ennanced the total volume of music that was sold. Unlike this case, there was no limit of any kind placed on the volume that might be sold in the entire market and each individual remained free to sell his

Individual Colleges Free to Negotiate Own Television Contracts

Continued from Page 1
College Football Association—could also run afoul of antitrust laws.

The N.C.A.A., which had no immediate comment on the Court's decision, last week was planning a meeting of several members of its football TV committee, with the full panel to meet within two weeks.

The Supreme Court's decision, in effect, invalidated the N.C.A.A.'s contracts with ABC, CBS, and the Entertainment and Sports Programming Network (ESPN), a cable operation. But colleges could, if they chose, voluntarily go along with an N.C.A.A. television plan, and there was some speculation last week that because there is little time before the football season, many may do just that.

Wayne Duke, commissioner of the Big Ten Conference, said his league would prefer to stay within some N.C.A.A. plan.

Officials of ABC and CBS both said they were confident that television viewers will be watching college football in a few weeks.

At NBC-TV, which has only televised bowl games in the past few years, spokesmen said the network was exploring possibilities. The network said an umbrella organization is needed to maintain order.

Eric L. Kemmler, associate general counsel for ESPN, said his organization planned to "explore other ways to get college football this fall. We have avenues and some ideas."

Included is an arrangement with the Atlantic Coast Conference to televise their games, Mr. Kemmler said, adding there are continuing negotiations with Pennsylvania State University for television rights.

The Ivy League announced last week that it had contracted with Eastern Educational Network, a regional network of the Public Broadcasting Service, to telecast nine games to about 48 stations in the Northeast.

The College Football Association, a group of 63 universities with big-time football programs, is ready to negotiate television contracts. The association has already endorsed two alternative TV plans for the coming season.

Charles M. Neinas, the C.F.A.'s executive director, said last week, "The position of the universities has been vindicated; the property-rights theory has been upheld. The N.C.A.A. does not have exclusive rights over televised college football. There are a number of unanswered questions, but the C.F.A. is prepared to address them promptly."

Justice Byron R. White, in a footnote to his dissent from the Supreme Court's decision, warned that the C.F.A. plans included some features similar to those condemned by the Court, and the association might well have antitrust problems of its own.

The C.F.A. plans would still schedule games on Saturday, as is traditional, with no team appearing more than four times in a season. No team would be guaranteed an appearance, but a portion of money received would be divided among participating institutions, no matter how many times their teams were on TV.

Pay for Keeping Statistics

The N.C.A.A. would also benefit from the C.F.A. plans, receiving money to pay for its football-related services, such as keeping statistics.

To participate, institutions would have to sign a letter agreeing to the plan's provisions.

Eugene F. Corrigan, director of athletics at the University of Notre Dame and a key force in developing the C.F.A. contingency plans, said he was not surprised by the Supreme Court's decision, but was unsure of what will happen next.

"I don't know whether this means that conferences or groups like the C.F.A. cannot band together," he said. "Those are questions which have to be answered after the lawyers review the brief."

He said colleges and universities appeared to have four possible options:

- The N.C.A.A. could have a voluntary plan.
- The top 80 or so football powers could put together a plan.
- The Big 10 and Pacific-10 conferences, which serve geographic areas that have nearly 40 per cent of the television sets in the country, could be separate from the C.F.A. plan.
- Each institution could "do its own thing."

"Our personal preference," Mr. Corrigan said, "has been a coalition plan which would include the C.F.A., Pac-10, and Big 10 schools."

Big football powers apparently prefer the C.F.A. plan or control by their own conferences, since it would best protect their interests. The N.C.A.A. has 788 member colleges, 506 of which play football. Of those, 105 compete in Division I-A, the top level of competition.

James I. Tarman, athletic director at Pennsylvania State University, which fields a Division I-A team that is considered one of the country's powerhouses, issued a statement supporting a group plan.

"The worst scenario is that everybody is on their own," he said. "We don't feel that this scenario is in the best interests of Penn State or in the best interests of college football. We want to be a part of a national plan which is voluntary, but which option or which contingency is best is difficult to say."

Vince Dooley, football coach at the University of Georgia, which was one of the plaintiffs in the case, was elated by the Court's decision. "It is now important to move forward in the best interests of college football," he said. "The plan at Georgia will be to work within the framework of a national and conference package. Any individual considerations will come after those plans are put into effect."

But such national plans have colleges with smaller football programs worried that they will be ignored by the networks in favor of institutions.

'The Rich Getting Richer'

H. R. "Tubby" Raymond, football coach at the University of Delaware, a Division I-AA institution, said, "I envision the adage of the rich getting richer and I also envision more pressure for some schools to operate beyond the bounds of rules because of the financial pressure to succeed and attract television contracts."

He added that some small institutions in isolated areas might benefit from negotiating rights to regional broadcast of football games, but small institutions in or near large metropolitan areas will suffer.

"We are in the enormous urban area of Philadelphia and Baltimore, so it is unlikely that a I-AA team will attract a major television contract," Mr. Raymond said. "For us to go after anything big and lucrative doesn't make any sense."

The winningest active coach in college football, Eddie Robinson of Grambling State University, also a Division I-AA institution, said the Court's ruling "puts us in a tough position. I go with the Constitution and what the Supreme Court thinks, but I think it's going to have a negative effect on the future of Division I-AA, Division II, and Division III. We aren't going to be able to get a piece of the television pie."

He added that recruiting would also be affected, predicting that top players would go to institutions where they would have the greatest opportunity to appear on television.

—CHARLES S. FARRELL

own music without restraint. Here production has been limited, not enhanced. No individual school is free to televise its own games without restraint. The NCAA's efficiency justification is not supported by the record.

Neither is the NCAA's television plan necessary to enable the NCAA to penetrate the market through an attractive package sale. Since broadcasting rights to college football constitute a unique product for which there is no ready substitute, there is no need for collective action in order to enable the product to compete against its nonexistent competitors. This is borne out by the District Court's finding that the NCAA's television *reduces* the volume of television rights sold.

V

Throughout the history of its regulation of intercollegiate football telecasts, the NCAA has indicated its concern with protecting live attendance. This concern, it should be noted, is not with protecting live attendance at games which *are* shown on television; that type of interest is not at issue in this case. Rather, the concern is that fan interest in a televised game may adversely affect ticket sales for games that will not appear on television.

Although the N.O.R.C. studies in the 1950's provided some support for the thesis that live attendance would suffer if unlimited television were permitted, the District Court found that there was no evidence to support that theory in today's market. Moreover, as the District Court found, the television plan has evolved in a manner inconsistent with its original design to protect gate attendance. Under the current plan, games are shown on television during all hours that college football games are played. The plan simply does not protect live attendance by insuring that games will not be shown on television at the same time as live events.

There is, however, a more fundamental reason for rejecting this defense.

The NCAA's argument that its television plan is necessary to protect live attendance is not based on a desire to maintain the integrity of college football as a distinct and attractive product, but rather on a fear that the product will not prove sufficiently attractive to draw live attendance when faced with competition from televised games. At bottom the NCAA's position is that ticket sales for most college games are unable to compete in a free market. The television plan protects ticket sales by limiting output—just as any monopolist increases revenues by reducing output. By seeking to insulate live ticket sales from the full spectrum of competition because of its assumption that the product itself is insufficiently attractive to consumers, petitioner forwards a justification that is inconsistent with the basic policy of the Sherman Act. "[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable."

VI

Petitioner argues that the interest in maintaining a competitive balance among amateur athletic teams is legitimate and important and that it justifies the regulations challenged in this case. We agree with the first part of the argument but not the second.

Our decision not to apply a *per se* rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved. It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics. The specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.

The NCAA does not claim that its television plan has equalized or is intended to equalize competition within any one league. The plan is nationwide in scope and there is no single league or tournament in which all college football teams compete. There is no evidence of any intent to equalize the strength of teams in Division I-A with those in Division II or Division III, and not even a colorable basis for giving colleges that have no football program at all a voice in the management of the revenues generated by the football programs at other schools. The interest in maintaining a competitive balance that is asserted by the NCAA as a justification for regulating all television of intercollegiate football is not related to any neutral standard or to any readily identifiable group of competitors. The television plan is not even arguably tailored to serve such an interest. It does not regulate the amount of money that any college may spend on its football program, nor the way in which the colleges may use the revenues that are generated by their football programs, whether derived from the sale of television rights, the sale of tickets, or the sale of concessions or program advertising. The plan simply imposes a restriction on one source of revenue that is more important to some colleges than to others.

There is no evidence that this restriction produces any greater measure of equality throughout the NCAA than would a restriction on alumni donations, tuition rates, or any other revenue producing activity. At the same time, as the District Court found, the NCAA imposes a variety of other restrictions designed to preserve amateurism which are much better tailored to the goal of competitive balance than is the television plan, and which are "clearly sufficient" to preserve competitive balance to the extent it is within the NCAA's power to do so. And much more than speculation supported the District Court's findings on this score.

No other NCAA sport employs a similar plan, and in particular the court found that in the most closely analogous sport, college basketball, competitive balance has been maintained without resort to a restrictive television plan.

Perhaps the most important reason for rejecting the argument that the interest in competitive balance is served by the television plan is the District Court's unambiguous and well supported finding that many more games would be televised in a free market than under the NCAA plan.

The hypothesis that legitimates the maintenance of competitive balance as a procompetitive justification under the Rule of Reason is that equal competition will maximize consumer demand for the product. The finding that consumption will materially increase if the controls are removed is a compelling demonstration that they do not in fact serve any such legitimate purpose.

VII

The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.

But consistent with the Sherman Act, the role of the NCAA must be to *preserve* a tradition that might otherwise die; rules that restrict output are hardly consistent with this role. Today we hold only that the record supports the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life. Accordingly, the judgment of the Court of Appeals is

Affirmed

Justice White's Dissent from Court's Ruling on NCAA Control of Football Telecasts

WASHINGTON

Following is the text of Justice Byron R. White's dissent from the Supreme Court's decision striking down the National Collegiate Athletic Association's control of televised college football. Justice William H. Rehnquist joined the opinion. Some citations and all but one footnote have been omitted.

The NCAA is an unincorporated, nonprofit, educational association whose membership includes almost 800 nonprofit public and private colleges and universities and more than 100 nonprofit athletic conferences and other organizations. Formed in 1905 in response to a public outcry concerning abuses in intercollegiate athletics, the NCAA, through its annual convention, establishes policies and rules governing its members' participation in college sports, conducts national championships, exerts control over some of the economic aspects of revenue-producing sports, and engages in some more-or-less commercial activities. Although some of the NCAA's activities, viewed in isolation, bear a resemblance to those undertaken by professional sports leagues and associations, the Court errs in treating intercollegiate athletics under the NCAA's control as a purely commercial venture in which colleges and universities participate solely, or even primarily, in the pursuit of profits. Accordingly, I dissent.

I

"While it would be fanciful to suggest that colleges are not concerned about the profitability of their ventures, it is clear that other, non-commercial goals play a central role in their sports programs." J. Weistart & C. Lowell, The Law of Sports §5.12 (1979). The NCAA's member institutions have designed their competitive athletic programs "to be a vital part of the educational system." Deviations from this goal, produced by a persistent and perhaps inevitable desire to "win at all costs," have in the past led, and continue to lead, to a wide range of competitive excesses that prove harmful to students and institutions alike. The fundamental policy underlying the NCAA's regulatory program, therefore, is to minimize such deviations and "to maintain intercollegiate athletics as an integral part of the education program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between college athletics and professional sports."

The NCAA, in short, "exist[s] primarily to enhance the contribution made by amateur athletic competition to the process of higher education as distinguished from realizing the maximum return on it as an entertainment commodity." In pursuing this goal, the organization and its members seek to provide a public good—a viable system of amateur athletics—that most likely could not be provided in a perfectly competitive market.

"Without regulation, the desire of member institutions to remain athletically competitive would lead them to engage in activities that deny amateurism to the public. No single institution could confidently enforce its own standards since it could not trust its competitors to do the same." The history of intercollegiate athletics prior to the advent of the NCAA provides ample support for this conclusion. By mitigating what appears to be a clear failure of the free market to serve the ends and goals of higher education, the NCAA insures the continued availability of a unique and valuable product, the very existence of which might well be threatened by unbridled competition in the economic sphere.

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In dissent, Justice White argued that college sports should not be seen as "purely commercial."

In pursuit of its fundamental goal and others related to it, the NCAA imposes numerous controls on intercollegiate athletic competition among its members, many of which "are similar to those which are summarily condemned when undertaken in a more traditional business setting." Thus, the NCAA has promulgated and enforced rules limiting both the compensation of student-athletes, and the number of coaches a school may hire for its football and basketball programs; it also has prohibited athletes who formerly have been compensated for playing from participating in intercollegiate competition, restricted the number of athletic scholarships its members may award, and established minimum academic standards for recipients of those scholarships; and it has pervasively regulated the recruitment process, student eligibility, practice schedules, squad size, the number of games played, and many other aspects of intercollegiate athletics. One clear effect of most, if not all, of these regulations is to prevent institutions with competitively and economically successful programs from taking advantage of their success by expanding their programs, improving the quality of the product they offer, and increasing their sports revenues. Yet each of these regulations represents a desirable and legitimate attempt "to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives." Significantly, neither the Court of Appeals nor this Court questions the validity of these regulations under the Rule of Reason.

Notwithstanding the contrary conclusion of the District Court, and the majority, I do not believe that the restraint under consideration in this case—the NCAA's television plan—differs fundamentally for antitrust purposes from the other seemingly anticompetitive aspects of the organization's broader program of self-regulation. The television plan, like many of the NCAA's actions, furthers several complementary ends. Specifically, the plan is designed "to reduce, insofar as possible, the adverse effects of live television . . . upon football game attendance and, in turn, upon the athletic and related educational programs dependent upon the proceeds therefrom; to spread football television participation among as many colleges as practicable; to reflect properly the image of universities as educational institutions; to promote college football through the use of television, to advance the overall interests of intercollegiate athletics, and to provide college football television to the public to the extent compatible with these other objectives." More generally, in my view, the television plan reflects the NCAA's fundamental policy of preserving amateurism and integrating athletics and education. Nor does the District Court's finding that the plan is intended to maximize television revenues warrant any implication that the NCAA and its member institutions pursue this goal without regard to the organization's stated policies.

Before addressing the infirmities in the Court's opinion, I should state my understanding of what the Court holds. To do so, it is necessary first to restate the essentials of the NCAA's television plan and to refer to the course of this case in the lower courts.

Under the plan at issue, four-year contracts were entered into the American Broadcasting Companies, Columbia Broadcasting System, and Turner Broadcasting System after competitive bidding. Every fall, ABC and CBS were to present 14 exposures of college football and Turner would show 19 evening games. The overall price for each network was stated in

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The Expanding Role of Television in College Football: a Chronology

1938: The first telecast of a college football game. In an experiment, a University of Pennsylvania game is broadcast from Franklin Field to the offices of the Philco Corporation. According to a briefing book prepared for the National Collegiate Athletic Association's football television committee in 1981: "As far as is known, there were six television sets in Philadelphia; and all were tuned to the game."

1940-1950: All University of Pennsylvania home football games are televised in Philadelphia.

1951: A committee reports to the N.C.A.A. convention in Dallas that "television does have an adverse effect on college football attendance and unless brought under control threatens to seriously harm the nation's overall athletic and physical system." A plan is developed allowing the televising of only one game per region per week, with a total blackout on 3 of the 10 Saturdays of the season. No team is permitted more than two appearances a year. The University of Pennsylvania challenges the plan and is declared by the N.C.A.A. a "member in bad standing," then agrees to abide by it.

1952: First national football telecast: the Rose Bowl, in which the University of Illinois defeats Stanford University, 40-7. The N.C.A.A. adopts a new policy stipulating that 12 games may be telecast nationally each year. Regional alternates are permitted, but no team may appear more than once a year. The N.C.A.A. accepts a bid of $1.1-million from the National Broadcasting Company, which, along with the sponsor, General Motors, selects the games.

1953: Fees for television rights rise to $1.7-million. In a case involving the National Football League, a federal court in Philadelphia rules that controlled TV contracts are legal restraints of trade.

1955: The one-appearance-per-team-per-season maximum is increased to two.

1959: Rights fees: $2.2-million.

1960: The N.C.A.A. accepts its first two-year contract, for $3.1-million per year, with the Columbia Broadcasting System. For the first time, "live" attendance at football games exceeds the levels of the late 1940's, before television.

1964: A two-year contract is awarded to NBC, which bid $6.5-million per year.

1966: The N.C.A.A. negotiates a two-year deal at $7.8-million per year directly with American Broadcasting Company. Under a series of two-year contracts, ABC continues to hold exclusive rights through 1977.

1977: The N.C.A.A. enters into its first four-year contract, with ABC, for the 1978-81 seasons, at an average of $30-million per year. The College Football Association is formed.

1980: Warner-Amex Cable Communications, wishing to televise Ohio State University football games, applies unsuccessfully to a federal court in Columbus for an antitrust injunction against ABC and the N.C.A.A.

May, 1981: The N.C.A.A. awards new four-year contracts to ABC and CBS, for 14 games per year on each network, with each paying almost $132-million. The association awards Turner Broadcasting System, Inc., a two-year, $18-million contract for cable-television rights.

July, 1981: The College Football Association signs a contract with NBC for $180-million for four years. N.C.A.A. threatens disciplinary action against members complying with the C.F.A. contract.

September, 1981: The Universities of Oklahoma and Georgia, initially with backing from the C.F.A., sue the N.C.A.A. in U.S. District Court in Oklahoma and obtain an injunction barring the N.C.A.A. from disciplining universities involved in the C.F.A. contract.

September, 1981: The University of Texas at Austin files, on behalf on C.F.A. members, a class-action suit against the N.C.A.A. in U.S. District Court in Austin, claiming that the association denies each member's right to televise its own games.

December, 1981: The C.F.A. announces that its agreement with NBC has been dissolved, due to lack of support from member institutions. With C.F.A. support, N.C.A.A. cuts its top football division from 137 to 94 teams.

June, 1982: Hearing of the Oklahoma-Georgia suit begins in Oklahoma City before a New Mexico District Court Judge, Juan G. Burciaga. All qualified judges in Oklahoma excused themselves because they were Oklahoma season-ticket holders.

August, 1982: Cox Broadcasting Corporation, ABC, and NBC are unsuccessful in Superior Court in Fulton County, Ga., in an attempt to gain an injuction against N.C.A.A. and Turner Broadcasting, claiming that cable telecasts violate network contracts.

August, 1982: University of Texas suit is dismissed.

September, 1982: Judge Burciaga rules that N.C.A.A. contracts violate the Sherman Antitrust Act by fixing prices for telecasts, restricting the number of telecasts, and acting as a "classic cartel." N.C.A.A. obtains an injunction, pending appeal.

May, 1983: The U.S. Court of Appeals for the Tenth Circuit turns down an N.C.A.A. petition for rehearing of the district court's decision. N.C.A.A. announces that it will appeal to the Supreme Court.

June, 1983: Supreme Court Justice Byron R. White grants a temporary stay of the lower-court rulings.

December, 1983: The Supreme Court announces that it will review the lower-court rulings.

March, 1984: The Supreme Court hears arguments in the N.C.A.A. appeal. ABC and CBS veto an N.C.A.A. plan to allow institutions to organize their own Saturday-night football telecasts.

May, 1984: The C.F.A. and the Big 10 and Pacific-10 Conferences discuss a joint football television plan. The N.C.A.A. signs a two-year, $11-million contract with the Entertainment and Sports Programming Network (ESPN) for rights to cable-television football coverage. The agreement allows telecasts of more games involving big-name teams than the previous cable agreement with Turner Broadcasting.

June 3, 1984: The C.F.A. approves two contingency television plans for 1984, one involving only C.F.A. members, the other also involving the Pacific-10 and the Big 10 Conferences.

June 27, 1984: The Supreme Court affirms, 7 to 2, the lower-court ruling, declaring that the N.C.A.A. contracts violate antitrust law.

Justice White's Dissent

Continued from Preceding Page

contracts. The networks select the games to be telecast and pay directly to the colleges involved what has developed to be a uniform fee for each game telecast. Unless within one of the exceptions, only the designated number of games may be broadcast, and no NCAA member may arrange for televising its games other than pursuant to the plan.

Under this scheme, of course, NCAA members must compete against one another for television appearances, although this competition is limited somewhat by the fact that no college may appear on television more than six times in any two-year period. In 1983, 242 games were televised, 89 network games and 153 under the exceptions provided in the television plan. In 1983, 173 schools appeared on television, 89 on network games and an additional 84 teams under the exceptions.

The District Court held that the plan constituted price fixing and output limitation illegal *per se* under §1 of the Sherman Act; it also held that the scheme was an illegal group boycott, was monopolization forbidden by §2, and was in any event an unreasonable restraint of trade. It then entered an injunction that for all practical purposes excluded the NCAA from interfering with or regulating its members' arrangements for televising their football games.

The Court of Appeals, while disagreeing with the boycott and monopolization holdings, otherwise upheld the District Court's judgment that the television plan violated the Sherman Act, focusing almost entirely on the price-fixing and output-limiting aspects of the television plan. The Court of Appeals, however, differed with the District Court with respect to the injunction. After noting that the injunction vested exclusive control of television rights in the individual schools, the court stated that, "while we hold that the NCAA cannot lawfully maintain exclusive control of the rights, how far such rights may be commonly regulated involves speculation that should not be made on the record of the instant case." The court expressly stated, for example, that the NCAA could prevent its members from telecasting games on Friday night in competition with high school games, emphasized that the disparity in revenue between schools could be reduced by "[a] properly drawn system of pass-over payments to insure adequate athletic funding for schools that do not earn substantial television revenues," and indicated that it was not outlawing "membership-wide contract[s] with opt-out and pass-over payment provisions, or blackout rules."

It nevertheless left the District Court's injunction in full force and remanded the case for further proceedings in light of its opinion. Anticipating that the Court would grant *certiorari*, I stayed the judgment of the Court of Appeals.

In affirming the Court of Appeals, the Court first holds that the television plan has sufficient redeeming virtues to escape condemnation as a *per se* violation of the Sherman Act, this because of the inherent characteristics of competitive athletics and the justifiable role of the NCAA in regulating college athletics. It nevertheless affirms the Court of Appeals' judgment that the NCAA plan is an unreasonable restraint of trade because of what it deems to be the plan's price-fixing and output-limiting aspects.

As I shall explain, in reaching this result, the Court traps itself in commercial antitrust rhetoric and ideology and ignores the context in which the restraints have been imposed. But it is essential at this point to emphasize that neither the Court of Appeals nor this Court purports to hold that the NCAA may not (1) require its members to televise their games to pool and share the compensation received among themselves, with other schools, and with the NCAA; (2) limit the number of times any member may arrange to have its games shown on television; or (3) enforce reasonable blackout rules to avoid head-to-head competition for television audiences. As I shall demonstrate, the Court wisely and correctly does not condemn such regulations. What the Court does affirm is the Court of Appeals' judgment that the NCAA may not limit the number of games that are broadcast on television and that it may not contract with an overall price that has the effect of setting the price for individual game broadcast rights.* I disagree with the Court in these respects.

II

"In a competitive market," the District Court observed, "each football-playing institution would be an independent seller of the right to telecast its football games. Each seller would be free to sell that right to any entity it chose," and "for whatever price it could get." Under the NCAA's television plan, member institutions' competitive freedom is restrained because, for the most part, television rights are bought and sold, not on a per-game basis, but as a package deal. With limited exceptions not particularly relevant to antitrust scrutiny of the plan, broadcasters wishing to televise college football must be willing and able to purchase a package of television rights without knowing in advance the particular games in which these rights apply. The real negotiations over price and terms take place between the broadcasters and the NCAA rather than between the broadcasters and the individual schools. Knowing that some games will be worth more to them than others, the networks undoubtedly exercise whatever bargaining power they posess to insure that the minimum aggregate compensation they agree to provide for the package bears some relation to the average value to them of the games they anticipate televising. Because some schools' games contribute disproportionately to the total value of the package, the manner in which the minimum aggregate compensation is distributed among schools whose games are televised has given rise to a situation under which less-prominent schools receive more in rights fees than they would receive in a competitive market and football powers like respondents receive less.

As I have said, the Court does not hold, nor did the Court of Appeals hold, that this redistributive effect alone would be sufficient to subject the television plan to condemnation under §1 of the Sherman Act. Nor should it, for an agreement to share football revenues to a certain extent is an essential aspect of maintaining some balance of strength among competing colleges and of minimizing the tendency to professionalism in the dominant schools. Sharing with the NCAA itself is also a price legitimately exacted in exchange for the numerous benefits of membership in the NCAA, including its many-faceted efforts to maintain a system of competitive, amateur athletics.

For the same reasons, limiting the number of television appearances by any college is an essential attribute of a balanced amateur athletic system. Even with shared television revenues, unlimited appearances by a few schools would inevitably give them an insuperable advantage over all others and in the end defeat any efforts to maintain a system of athletic competition among amateurs who measure up to college scholastic requirements.

The Court relies instead primarily on the District Court's findings that (1) the television plan restricts output; and (2) the plan creates a noncompetitive price structure that is unresponsive to viewer demand. These findings notwithstanding, I am unconvinced that the television plan has a substantial anticompetitive effect.

First, it is not clear to me that the District Court employed the proper measure of output. I am not prepared to say that the District Court's finding that "many more college football games would be televised" in the absence of the NCAA controls is clearly erroneous. To the extent that output is measured solely in terms of the number of televised games, I need not deny that it is reduced by the NCAA's television plan. But this measure of output is not the proper one. The District Court found that eliminating the plan would reduce the number of games on network television and increase the number of games shown locally and regionally. It made no finding concerning the effect of the plan on total viewership.

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* This litigation was triggered by the NCAA's response to an attempt by the College Football Association, an organization of the more dominant football-playing schools and conferences, to develop an independent television plan. To the extent that its plan contains features similar to those condemned as anticompetitive by the Court, the CFA may well have antitrust problems of its own. To the extent that they desire continued membership in the NCAA, moreover, participation in a television plan developed by the CFA will not exempt football powers like respondents from the many kinds of NCAA controls over television appearances that the Court does not purport to invalidate

Justice White's Dissent

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which is the more appropriate measure of output or, at least, of the claimed anti-competitive effects of the NCAA plan. This is the NCAA's position, and it seems likely to me that the television plan, by increasing network coverage at the expense of local broadcasts, actually expands the total television audience for NCAA football. The NCAA would surely be an irrational "profit maximizer" if this were not the case. In the absence of a contrary finding by the District Court, I cannot conclude that respondents carried their burden of showing that the television plan has an adverse effect on output and is therefore anticompetitive.

Second, and even more important, I am unconvinced that respondents have proved that any reduction in the number of televised college football games brought about by the NCAA's television plan has resulted in an anticompetitive increase in the price of television rights. The District Court found, of course, that "the networks are actually paying the large fees because the NCAA agrees to limit production. If the NCAA would not agree to limit production, the networks would not pay so large a fee." Undoubtedly, this is true. But the market for television rights to college football competitions should not be equated to the markets for wheat or widgets. Reductions in output by monopolists in most product markets enable producers to exact a higher price for *the same product*. By restricting the number of games that can be televised, however, the NCAA creates a *new product*—exclusive television rights—that are more valuable to networks than the products that its individual members could market independently.

The television plan makes a certain number of games available for purchase by television networks and limits the incidence of head-to-head competition between football telecasts for the available viewers. Because competition is limited, the purchasing network can count on a larger share of the audience, which translates into greater advertising revenues and, accordingly, into larger payments per game to the televised teams. There is thus a relationship between the size of the rights payments and the value of the product being purchased by the networks; a network purchasing a series of games under the plan is willing to pay more than would one purchasing the same games in the absence of the plan since the plan enables the network to deliver a larger share of the available audience to advertisers and thus to increase its own revenues. In short, by focusing only on the price paid by the networks for teleivsion rights rather than on the nature and quality of the product delivered by the NCAA and its member institutions, the District Court, and this Court as well, may well have deemed anticompetitive a rise in price that more properly should be attributed to an increase in output, measured in terms of viewership.

Third, the District Court's emphasis on the prices paid for particular games seems misdirected and erroneous as a matter of law. The distribution of the minimum aggregate fees among participants in the television plan is, of course, not wholly based on a competitive price structure that is responsive to viewer demand and is only partially related to the value those schools contribute to the total package the networks agree to buy. But as I have already indicated, this "redistribution" of total television revenues is a wholly justifiable, even necessary, aspect of maintaining a system of truly competitive college teams. As long as the NCAA cannot artificially fix the price of the entire package and demand supercompetitive prices, this aspect of the plan should be of little concern. And I find little, if anything, in the record to support the notion that the NCAA has power to extract from the television networks more than the broadcasting rights are worth in the marketplace.

III

Even if I were convinced that the District Court did not err in failing to look to total viewership, as opposed to the number of televised games, when measuring output and anticompetitive effect and in failing fully to consider whether the NCAA possesses power to fix the package price, as opposed to the distribution of that package price among participating teams, I would nevertheless hold that the television plan passes muster under the Rule of Reason.

The NCAA argues strenuously that the plan and the network contracts "are part of a joint venture among many of the nation's universities to create a product—high-quality college football—and offer that product in a way attractive to both fans in the stadiums and viewers on [television]. The cooperation in producing the product makes it more competitive against other [television] (and live) attractions." The Court recognizes that, "[i]f the NCAA faced 'interbrand' competition from available substitutes, then certain forms of collective action might be appropriate in order to enhance its ability to compete." It rejects the NCAA's proffered procompetitive justification, however, on the ground that college football is a unique product for which there are no available substitutes and "there is no need for collective action in order to enable the product to compete against its nonexistent competitors." This proposition is singularly unpersuasive.

It is one thing to say that "NCAA football is a unique product," that "intercollegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience." It is quite another, in my view, to say that maintenance or enhancement of the quality of NCAA football telecasts is unnecessary to enable those telecasts to compete effectively against other forms of entertainment. The NCAA has no monopoly power when competing against other types of entertainment. Should the quality of the NCAA's product "deteriorate to any perceptible degree or should the cost of 'using' its product rise, some fans undoubtedly would turn to another form of entertainment. . . . Because of the broad possibilities for alternative forms of entertainment," the NCAA "properly belongs in the broader 'entertainment' market rather than in . . . [a] narrower marke[t]" for sports or football.

The NCAA has suggested a number of plausible ways in which its television plan might enhance the ability of college football telecasts to compete against other forms of entertainment. Although the District Court did conclude that the plan is "not necessary for effective marketing of the product," 546 F. Supp., at 1307, its finding was directed only at the question whether college football telecasts would continue in the absence of the plan. It made no explicit findings concerning the effect of the plan on viewership and thus did not reject the factual premise of the NCAA's argument that the plan might enhance competition by increasing the market penetration of NCAA football. The District Court's finding that network coverage of NCAA football would likely decrease if the plan were struck down, in fact, strongly suggests the validity of the NCAA's position. On the record now before the Court, therefore, I am not prepared to conclude that the restraints imposed by the NCAA's television plan are "such as may suppress or even destroy competition" rather than "such as merely regulat[e] and perhaps thereby promot[e] competition."

IV

Finally, I return to the point with which I began—the essentially noneconomic nature of the NCAA's program of self-regulation. Like Judge Barrett, who dissented in the Court of Appeals, I believe that the lower courts "erred by subjugating the NCAA's educational goals (and, coincidentally, those which Oklahoma and Georgia insist must be maintained in any event) to the purely competitive commercialism of [an] 'every school for itself' approach to television contract bargaining." Although the NCAA does not enjoy blanket immunity from the antitrust laws, it is important to remember that the Sherman Act "is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives."

The fact that a restraint operates on nonprofit educational institutions as distinguished from business entities is as "relevant in determining whether that particular restraint violates the Sherman Act" as is the fact that a restraint affects a profession rather than a business. The legitimate noneconomic goals of colleges and universities should not be ignored in analyzing restraints imposed by associations of such institutions on their members, and these noneconomic goals "may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." The Court of Appeals, like the District Court, flatly refused to consider what it termed "noneconomic" justifications advanced by the NCAA in support of the television plan. It was of the view that our decision in *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978), precludes reliance on noneconomic factors in assessing the reasonableness of the television plan. This view was mistaken, and I note that the Court does not in so many words repeat this error.

Professional Engineers did make clear that antitrust analysis usually turns on "competitive conditions" and "economic conceptions." Ordinarily, "the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." The purpose of antitrust analysis, the Court emphasized, "is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry." Broadly read, these statements suggest that noneconomic values like the promotion of amateurism and fundamental educational objectives could not save the television plan from condemnation under the Sherman Act.

But these statements were made in response to "public interest" justications proffered in defense of a ban on competitive bidding imposed by practitioners engaged in standard, profit-motivated commercial activities. The primarily noneconomic values pursued by educational institutions differ fundamentally from the "overriding commercial purpose of [the] day-to-day activities" of engineers, lawyers, doctors, and businessmen, and neither *Professional Engineers* nor any other decision of this Court suggests that associations of nonprofit educational institutions must defend their self-regulatory restraints solely in terms of their competitive impact, without regard for the legitimate noneconomic values they promote.

When these values are factored into the balance, the NCAA's television plan seems eminently reasonable. Most fundamentally, the plan fosters the goal of amateurism by spreading revenues among various schools and reducing the financial incentives toward professionalism. As the Court observes, the NCAA imposes a variety of restrictions perhaps better suited than the television plan for the preservation of amateurism. Although the NCAA does attempt vigorously to enforce these restrictions, the vast potential for abuse suggests that measures, like the television plan, designed to limit the rewards of professionalism are fully consistent with, and essential to the attainment of, the NCAA's objectives. In short, "[t]he restraints upon Oklahoma and Georgia and other colleges and universities with excellent football programs insure that they confine those programs within the principles of amateurism so that intercollegiate athletics supplement, rather than inhibit, educational achievement." The collateral consequences of the spreading of regional and national appearances among a number of schools are many: the television plan, like the ban on compensating student-athletes, may well encourage students to choose their schools, at least in part, on the basis of educational quality by reducing the perceived economic element of the choice; it helps insure the economic viability of athletic programs at a wide variety of schools with weaker football teams; and it "promot[es] competitive football among many and varied amateur teams nationwide."

These important contributions, I believe, are sufficient to offset any minimal anticompetitive effects of the television plan.

For all of these reasons, I would reverse the judgment of the Court of Appeals. At the very least, the Court of Appeals should be directed to vacate the injunction of the District Court pending the further proceedings that will be necessary to amend the outstanding injunction to accommodate the substantial remaining authority of the NCAA to regulate the telecasting of its members' football games.

Witnesses at Hearing Clash over Regulation of Academic Standards for College Athletes

WASHINGTON

Several witnesses at a Senate hearing last week said the job of policing college sports should be left to the National Collegiate Athletic Association and its members, but one said that would be "like putting Dracula in charge of the blood bank."

The witness, Harry Edwards, a sports sociologist and associate professor of sociology at the University of California at Berkeley, said that only with federal intervention would colleges move away from the "dumb jock syndrome."

The testimony came as the Senate Subcommittee on Education, Arts, and Humanities held hearings on legislation to improve academic standards and educational opportunities for college athletes. Sen. Howard M. Metzenbaum, Democrat of Ohio, said legislation might be needed to end the abuse of college athletes.

"As far as I'm concerned," he said, "every student is in college to receive, first and foremost, an education and a degree. In far too many cases, a student-athlete leaves school with neither."

Several witnesses, including John L. Toner, president of the N.C.A.A. and athletic director at the University of Connecticut, said the N.C.A.A. was taking steps to change that. Academic standards for athletes have already been improved, Mr. Toner said, and he argued that a new rule that athletes must make "progress toward a degree" will improve the athletes' graduation rate.

Dean Smith, basketball coach at the University of North Carolina, also questioned federal involvement in college athletics, while declaring that standards of eligibility for athletes should be raised even higher. "Universities are supposed to lead society, not reflect society," he said.

Mr. Smith also called for "no-cut contracts" for athletes. He would guarantee an athlete financial aid for four years—or however long it takes the player to earn a degree, regardless of whether he or she makes the team or is injured and cannot play. Athletic scholarships are now awarded on a year-to-year basis.

Mr. Smith said he would also make freshmen ineligible to play varsity sports, thereby giving them time to establish themselves as students.

It was Mr. Edwards who was most critical of the *status quo* in intercollegiate athletics. The exaggerated emphasis on sports begins when an athlete is in high school, he said, and by the time an athlete reaches college, nothing is demanded of him intellectually. Even with the best of intentions, he said, "we have created what can only be termed a 'collegiate athletic arms race.' "

Senator Metzenbaum said that while federal legislation on college athletics was unlikely in the near future, the N.C.A.A. should look toward making its own improvements. "If we don't police our problems now," he said, "and move in the appropriate direction of fairness to these athletes, then there will be legislation involved down the line."

—CHARLES S. FARRELL